RECORD AND BRIEFS

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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

RICHARD ARMSTRONG, *et al.*,

Petitioners,

—v.—

EXCEPTIONAL CHILD CENTER, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICI CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, THE MEXICAN AMERICAN LEGAL DEFENSE & EDUCATIONAL FUND, AND THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The **American Civil Liberties Union** ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 500,000 members, dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Founded in 1920, the ACLU has vigorously defended civil liberties for over ninety years, working daily in courts, legislatures and communities to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee everyone in this country. The ACLU has appeared before this Court in numerous civil rights cases, both as direct counsel and as amicus curiae.

The **NAACP Legal Defense & Educational Fund, Inc.** ("LDF") is a non-profit legal organization established to assist African Americans and other people of color in securing their civil and constitutional rights. For more than six decades, LDF attorneys have represented parties and appeared as amicus curiae in litigation before the Supreme Court and other federal courts on matters of race discrimination, including through the type of direct constitutional enforcement actions at issue in this case.

The **Mexican American Legal Defense and Educational Fund** ("MALDEF") is a national civil rights organization established in 1968. Its principal

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[1] All parties have filed blanket consents to the submission of this amicus brief. No counsel for a party authored this brief in whole or in part, and no person, other than the amici curiae, their members, or their counsel made any monetary contribution to the preparation or submission of this brief.

objective is to promote the civil rights of Latinos living in the United States through litigation, advocacy and education. MALDEF has represented Latino and minority interests in civil rights cases in the federal courts throughout the nation, including the Supreme Court. MALDEF's mission includes a commitment to protect the rights of immigrant Latinos in the United States, and MALDEF has asserted preemption theories in federal court to further this commitment.

The **Lawyers' Committee for Civil Rights Under Law** ("Lawyers' Committee") is a national non-profit civil rights organization that was founded in 1963 at the request of President John F. Kennedy to marshal the resources of the private bar to defend the civil rights of racial minorities and the poor. For over fifty years, the Lawyers' Committee has been at the forefront of many of the most significant cases involving race and national origin discrimination, including many involving Constitutional claims. The Lawyers' Committee ability to vindicate the Constitutional rights of its clients is dependent upon the openness of the federal courts to hearing those claims.

SUMMARY OF ARGUMENT

Enforcement of the Constitution is not dependent on affirmative action by the political branches of government. Rather, from this Nation's earliest times to the present, the federal courts have consistently exercised their equitable powers to compel compliance with the Constitution, without suggesting the necessity for a statutory vehicle, such as 42 U.S.C. § 1983, for such authority. Those

equitable powers have been, and continue to be, particularly important for racial and ethnic minorities, immigrants, persons with disabilities, low-income individuals, and others whom our majoritarian political processes are often unwilling or unable to protect against constitutional violations. Indeed, direct actions brought to enforce compliance with the Constitution have resulted in many of this Court's most important civil rights and civil liberties decisions, including *Bolling v. Sharpe*, 347 U.S. 497 (1954), *Terry v. Adams*, 345 U.S. 461 (1953), *Truax v. Raich*, 239 U.S. 33 (1915), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); in none of those cases did the Court suggest that it was acting under § 1983 or another statutory vehicle. That history is consistent with the many cases in which this Court enforced other provisions of the Constitution, such as the Contracts Clause and Commerce Clause, as well as structural principles of federalism and separation of powers.

Such direct actions are also available to enforce a claim of preemption under the Supremacy Clause, including where the preemption is based on a statute enacted under Congress's spending power. This Court has entertained and sustained many direct actions based on federal preemption, recognizing the appropriateness of such actions to vindicate the supremacy of federal law. Petitioner suggests that direct preemption actions should be drastically restricted to situations in which federal law creates a defense to threatened state action, but that rule would seriously undermine the supremacy of federal law. In many contexts, a direct action is the only way in which the supremacy of federal law can be established. Moreover, allowing plaintiffs to

raise their Supremacy Clause claims alongside other constitutional claims is more efficient than Petitioner's overly restrictive approach.

Direct actions remain critical to vindicate the supremacy of federal law. This is especially true for racial and ethnic minorities, immigrants, persons with disabilities, and low-income individuals, who in many circumstances have difficulty obtaining access to, or support from, the federal political branches, and who often depend on a judicial remedy to prevent enforcement of state laws that conflict with federal laws. In contexts as diverse as immigration, housing, and public assistance, direct actions remain the only effective avenue to ensure the supremacy of federal law. Eliminating that avenue would seriously undermine the force and power of federal law.

For practical and political reasons, the United States does not bring enforcement actions against every state law that violates the Supremacy Clause. Termination of federal funding is even rarer and can be counterproductive. Absent direct actions brought to establish the supremacy of federal law by those most directly affected by preempted state laws, there would frequently be no meaningful remedy for state noncompliance with this fundamental Constitutional safeguard.

ARGUMENT

I. THE JUDICIARY'S LONGSTANDING AUTHORITY TO ENFORCE THE CONSTITUTION THROUGH DIRECT ACTIONS HAS BEEN PARTICULARLY CRITICAL FOR CIVIL RIGHTS AND CIVIL LIBERTIES.

This Court has long recognized that the strictures of the Constitution may be enforced through direct actions for equitable relief, regardless of whether Congress has enacted legislation specifically establishing a cause of action for such relief. So long as the court has subject-matter jurisdiction over the claim, separate legislation establishing a cause of action has never been necessary for a plaintiff to obtain forward-looking relief from unconstitutional conduct. Rather, the traditional equitable authority of the courts has always been deemed sufficient to provide such a remedy. The Court has adhered to this principle in many contexts—whether the constitutional claim was brought against federal, state, or local officials; whether the claim was brought to enforce individual constitutional rights or to enforce structural principles in the Constitution; and whether or not the claim was brought to preclude an anticipated enforcement action.

The courts' inherent equitable authority to compel compliance with the Constitution is implicit in the structure of the Constitution itself, and in the Constitution's status as the supreme law of the land. *See* Resp. Br. 7-15. As the Court recognized in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803),

judicial review is necessary as a check against the aggrandizement of power by the political branches. These structural principles not only protect each branch from intrusion by the others, but they also protect individuals from the abuse of governmental power. *See Bond v. United States*, 131 S. Ct. 2355, 2363-2364 (2011). Thus, as Chief Justice Marshall explained, "[t]he very essence of civil liberty" is "the right of every individual to claim the protection of the laws, whenever he receives an injury." 5 U.S. (1 Cranch) at 163. Although federal legislation may channel the way in which constitutional claims are entertained by the courts, the courts have long understood that the right to compel compliance with the Constitution is not contingent on the assent of the political branches. *See Webster v. Doe*, 486 U.S. 592, 603 (1988) (stressing that a "'serious constitutional question'" would arise if the political branches attempted to preclude any judicial forum for constitutional claims by failing to make statutory allowance for such claims); *see also* Federalist No. 78 (Hamilton) ("[T]he courts were designed to be an intermediate body between the people and the legislature, in order to keep the latter within the limits assigned to their authority.").

A. Civil Rights Claims Have Long Been Enforceable Through Direct Actions.

The ability to enforce rights directly under the Constitution has been particularly important for racial and ethnic minorities, immigrants, persons with disabilities, low-income individuals, and other persons who have faced systemic barriers in our majoritarian political process and thus have often depended on the federal courts to secure their rights

when Congress and the Executive Branch have been unable or unwilling to do so.[2] Some of this Court's (and this country's) most significant steps toward achieving equality and liberty have resulted from plaintiffs' enforcement of their rights directly under the Constitution. And that was particularly true in the long period before this Court's decision in *Monroe v. Pape*, 365 U.S. 167 (1961), which revived 42 U.S.C. § 1983 as a vehicle for private enforcement of constitutional rights.

Many landmark civil rights decisions resulted from direct actions to enforce the Constitution. One such case, *Bolling v. Sharpe*, 347 U.S. 497 (1954), is a keystone of this Court's desegregation precedent. The *Bolling* plaintiffs challenged racial segregation in the public schools of the District of Columbia under the Due Process Clause of the Fifth Amendment. The Court ruled unanimously for the plaintiffs, holding that racial segregation in the District's public schools violated the Fifth Amendment. The Court nowhere suggested that the plaintiffs' ability to be heard on their due process claim depended on their ability to point to a statutory cause of action, such as § 1983.[3]

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[2] *See Chambers* v. *Florida*, 309 U.S. 227, 241 (1940) ("Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.").

[3] Indeed, at the time, it was an open question whether § 1983 applied to the District of Columbia. The Court did not address the question until *District of Columbia v. Carter*, 409 U.S. 418 (1973), which held that § 1983 did not apply to persons acting under color of D.C. law. Congress later amended § 1983 to apply to such persons. Act of Dec. 29, 1979, Pub. L. No. 96-170, § 1, 93

Desegregation in higher education was advanced through another direct constitutional action, *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950). After the University of Oklahoma denied the plaintiff admission to graduate school on the basis of his race, McLaurin sued for injunctive relief, alleging that the state law prohibiting integrated schools deprived him of equal protection. The district court agreed. The Oklahoma legislature then amended the statute, allowing the university to admit the plaintiff but restricting him to segregated facilities. The plaintiff returned to the district court to seek injunctive relief, which the district court denied. The Supreme Court reversed, holding that the amended state law permitting segregated facilities deprived McLaurin of his right to equal protection. *Id.* at 642. The Court nowhere suggested that McLaurin's ability to bring his constitutional claim depended on a statutory cause of action.[4]

Stat. 1284.

[4] Another landmark desegregation case, *Brown* v. *Bd. of Educ.*, 347 U.S. 483 (1954)—which also did not mention the predecessor statute to § 1983—can be seen as a direct constitutional action as well, although commentators disagree on how to characterize that case. *Compare* Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. Rev. 681, 685-686 (2009) (characterizing *Brown* as a direct constitutional action) *and* Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. Cal. L. Rev. 289, 355 (1995) (same), *with* Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. Rev. 1, 1-2, 19 (1985) (characterizing *Brown* as a § 1983 suit) *and* Rodney A. Smolla, *Federal Civil Rights Acts* § 14:2, at 391-392 (3d ed. 2011) (same). Regardless,

In an equally important decision for minority voting rights, the Court in *Terry v. Adams*, 345 U.S. 461 (1953), sustained a constitutional challenge by black citizens to one of a series of schemes to maintain whites-only primary elections in Texas. Having abandoned their claim for damages, the *Terry* plaintiffs rested their equitable claims directly on the Fourteenth and Fifteenth Amendments. *Id.* at 478 nn.2 & 3 (Clark, J. concurring). The Court struck down the racially discriminatory primary as unconstitutional. *Id.* at 470; *see also id.* at 467 n.2 (plurality opinion) (noting that the Fifteenth Amendment is "'self-executing'"). In so ruling, the Court relied on its earlier decision in *Guinn v. United States*, 238 U.S. 347 (1915), which invalidated grandfather clauses under the Fifteenth Amendment, even though Congress had not enacted specific legislation reaching primary elections, due to "the self-executing power of the 15th Amendment," *id.* at 368.

Several of this Court's pathmarking decisions establishing the rights of non-citizens also reached the Court by way of direct action. For example, in *Truax v. Raich*, 239 U.S. 33 (1915), this Court held that an Arizona statute prohibiting the employment of non-citizens violated their rights to equal protection under the Fourteenth Amendment. The Court did not suggest that the case was before it under a statutory cause of action, such as § 1983, but rather stressed that the plaintiff had invoked the equitable power of the district court to restrain

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Bolling demonstrates that there is a direct right of action under the Constitution to challenge the legality of racial segregation in public schools.

unconstitutional action. Similarly, in *Terrace v. Thompson*, 263 U.S. 197 (1923), the Court, although rejecting an immigrant's constitutional claim on the merits, stressed that the power to compel compliance with the Constitution rested on the courts' traditional equitable powers, noting that equity jurisdiction will be exercised to enjoin unconstitutional state laws "wherever it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable." *Id.* at 214.

Similarly, one of this Court's leading decisions on the meaning of "liberty" within the Due Process Clause, *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925), arrived at the Court by way of a direct action brought to enforce the Fourteenth Amendment and to prevent Oregon officials from implementing a state compulsory education law that would have forced all children to attend public schools. *See id.* at 530. The Court nowhere referred to a statutory cause of action under which the claim for equitable relief was brought. The district court where the case was originally brought observed that "[t]he question as to equitable jurisdiction is a simple one, and it may be affirmed that, without controversy, the jurisdiction of equity to give relief against the violation or infringement of a constitutional right, privilege, or immunity, threatened or active, to the detriment or injury of a complainant, *is inherent*, unless such party has a plain, speedy, and adequate remedy at law." *Soc'y of Sisters v. Pierce*, 296 F. 928, 931 (D. Or. 1924) (emphasis added).

This theme—that the courts have inherent authority to restrain violations of the Constitution,

so long as they have subject-matter jurisdiction—runs throughout the Court's decisions and has never been seriously questioned. In *Bell v. Hood*, 327 U.S. 678, 684 (1946) (footnote omitted), the Court observed that "it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the State to do"—without any mention of a statutory vehicle such as § 1983. And although Justices of this Court have debated whether *damages* should be available to remedy *past* constitutional violations in the absence of a statutory cause of action, *see Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring), the Court has never questioned courts' inherent authority to enjoin threatened or ongoing constitutional violations. *See, e.g., Carlson v. Green*, 446 U.S. 14, 42 (1980) (Rehnquist, J., dissenting) (criticizing direct constitutional actions for damages, but acknowledging tradition of direct constitutional actions for equitable relief, and noting that "[t]he broad power of federal courts to grant equitable relief for constitutional violations has long been established").

Moreover, contrary to Petitioner's assertion (Pet. Br. 40), the Court has entertained such direct actions to enforce the Constitution regardless of whether they were "an anticipatory defense to state enforcement or regulation of the plaintiff's conduct." *See infra* pp. 19-22; *see also* Pet. Br. 45-46 (noting several preemption cases that did not involve anticipatory defenses). Indeed, where the plaintiff

could not bring the claim defensively to an enforcement action, the case for exercise of the courts' equity power is particularly compelling because the plaintiff could well have no other way to vindicate his constitutional rights. In the desegregation and voting rights cases discussed above, for example, there was no clear way for the plaintiffs seeking to vindicate their constitutional rights to have obtained a ruling on the merits of their claims except through affirmative litigation. And in *Truax*, the district court observed that the non-citizen's constitutional claim presented an appropriate case for the exercise of equity power because, under the challenged Arizona statute, only employers, not (non-citizen) employees, were subject to criminal prosecution; thus, the non-citizen employee would have had no other forum for his or her claim to be heard. *Raich v. Truax*, 219 F. 273, 283-284 (D. Ariz. 1915). If a plaintiff seeking to enforce the Constitution has no other forum in which to raise his or her claim, that provides a stronger—not a weaker—rationale for the courts to entertain a direct equitable action.

B. Constitutional Claims Outside The Civil Rights Context Have Also Long Been Enforceable Through Direct Actions.

These civil rights cases are in keeping with historical tradition, in which this Court has long recognized direct actions to enforce constitutional provisions, regardless of whether Congress has provided a specific statutory vehicle for enforcement of the Constitution.

One of the earliest examples is *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824), in which this Court resolved the Bank of the United States' suit against the Ohio Auditor for collecting a state tax that conflicted with the federal statute that created the Bank. Although no statute created a cause of action for the Bank, this Court found that the dispute warranted the "interference of a Court," and it held the Ohio law unconstitutional on the ground that it was "repugnant to a law of the United States" and, therefore, void under the Supremacy Clause. *Id.* at 838, 868.

In the years after *Osborn*, and with increasing frequency after Congress provided for federal-question jurisdiction in 1875, courts routinely entertained suits to enforce directly a broad range of constitutional provisions, including the Contracts Clause, the Fourteenth Amendment's Due Process Clause, and the dormant Commerce Clause. *See, e.g.*, *Hays v. Port of Seattle*, 251 U.S. 233 (1920) (Due Process Clause and Contracts Clause); *Vicksburg Waterworks Co. v. Mayor & Aldermen of Vicksburg*, 185 U.S. 65 (1902) (Contracts Clause); *Chicago Burlington & Quincy R.R. Co. v. City of Chi.*, 166 U.S. 226 (1897) (Due Process Clause); *Scott v. Donald*, 165 U.S. 107 (1897) (Commerce Clause); *Allen v. Baltimore & Ohio R.R. Co.*, 114 U.S. 311 (1884) (Contracts Clause).

The direct actions for equitable relief brought to enforce the Contracts Clause are particularly noteworthy because this Court has not settled whether claims under the Contracts Clause may be brought under § 1983. *See Dennis v. Higgins*, 498 U.S. 439, 456-457 (1991) (Kennedy, J., dissenting);

Crosby v. City of Gastonia, 635 F.3d 634, 640-641 (4th Cir.) (noting issue), *cert. denied*, 132 S. Ct. 112 (2011). Nonetheless, the Court explained in *Vicksburg Waterworks* that the Contracts Clause claim was properly before it because "the case presented by the bill is within the meaning of the Constitution of the United States and within the jurisdiction of the circuit court as presenting a Federal question"—without suggesting that a statutory cause of action was also necessary. 185 U.S. at 82. The Court more recently upheld a Contracts Clause claim in a direct-action posture in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), without discussing whether the claim might have been brought under § 1983.

One of the most notable of these cases was *Ex Parte Young*, 209 U.S. 123 (1908). After the Minnesota Attorney General signaled his intention to enforce a state law limiting the rates that railroads could charge, a group of railroad shareholders sued him to enjoin enforcement of that law, arguing that it violated the Commerce Clause and Due Process Clause of the Fourteenth Amendment. The Court concluded that the Eleventh Amendment does not bar suits against state officers to enjoin violations of the Constitution or federal law. *Id.* at 159-160. The Court also concluded that the federal courts had jurisdiction because the case raised "Federal questions" directly under the Constitution. *Id.* at 143-145. The Court thus viewed the Constitution—paired with the federal-question jurisdiction statute—as providing the basis of the plaintiffs' right to sue a state officer to enjoin an alleged constitutional violation. As this Court has observed, "the availability of prospective relief of the sort

awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). Indeed, scholars have concluded that "the best explanation of *Ex parte Young* and its progeny is that the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution and laws."[5]

Also demonstrating this principle are the numerous cases in which this Court has resolved structural constitutional claims brought against the federal government without suggesting that a statutory cause of action was necessary for those claims to be before the courts, and where there was no evident alternative forum for those claims to be heard (such as under the Administrative Procedure Act or in defense to an enforcement action). *See Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992); *South Carolina v. Baker*, 485 U.S. 505 (1988); *South Dakota v. Dole*, 483 U.S. 203 (1987); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *see also Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 & n.2 (2010) (ruling that Appointments Clause claim was properly before the courts, despite the absence of a statutory cause of action); *accord Bond*, 131 S. Ct. at 2363-2364 ("The individual, in a proper case, can assert injury from governmental action taken in excess of the authority

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[5] Charles Alan Wright et al., *Federal Practice and Procedure* § 3566, at 292 (3d ed. 2008).

that federalism defines."); *see also id.* at 2365 ("The structural principles secured by the separation of powers protect the individual as well.").

C. The Supremacy Clause As Well May Be Enforced Through Direct Equitable Actions.

Given the courts' historical willingness to entertain direct actions to enforce the Constitution, it would be surprising to learn that the Supremacy Clause, alone among the Constitution's provisions, could not be so enforced. As the Framers explained, the Supremacy Clause is fundamental to the Constitution, for if the laws of the United States "were not to be supreme," then "they would amount to nothing." Federalist No. 33 (Hamilton). The Supremacy Clause thus "flows immediately and necessarily from the institution of a federal government." *Id.*; *see also* Resp. Br. 13-15. In keeping with historical tradition, direct actions under the Supremacy Clause have played an important role in vindicating the supremacy of federal law, as *Osborn* and *Ex parte Young* illustrate.

This Court has implicitly recognized a right of action under the Supremacy Clause to enjoin preempted state law in many contexts—including cases where the preempting federal law was enacted pursuant to Congress's Spending Clause powers, and where state participation in the federal program was voluntary.[6] By routinely resolving such claims on the

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[6] *See, e.g., Arkansas Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268 (2006) (federal Medicaid law preempts state statute imposing liens on tort settlement proceeds). In *Pharm. Research & Mfrs. of America v. Walsh*, 538 U.S. 644 (2003) *("PhRMA")*, seven Justices (four in the plurality and

merits, without regard to whether a federal statute confers a right of action, this Court has established not only that federal courts have subject-matter jurisdiction over claims to enjoin preempted state law, but also that there is a right of action under the Supremacy Clause for such claims. It is particularly noteworthy that the Court entertained such Supremacy Clause claims without reference to a statutory cause of action long before *Maine v. Thiboutot*, 448 U.S. 1 (1980), established that § 1983 may be used to vindicate federal statutory—in addition to federal constitutional—rights against state interference. *See, e.g.*, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Asakura v. City of Seattle*, 265 U.S. 332 (1924). That tradition continues unbroken to this day.[7]

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three in dissent) reached and resolved the merits of plaintiff's claim that the challenged state law was preempted by the federal Medicaid statute. *See id.* at 649-670 (plurality opinion) (finding on the merits that state law was not preempted); *id.* at 684 (O'Connor, J., concurring in part and dissenting in part) (finding on the merits that the state law was preempted). By so doing, seven Justices implicitly concluded both that the Court had the authority to resolve the case under federal-question jurisdiction and that the plaintiff had a claim to injunctive relief under the Supremacy Clause. *See id.* at 668 (plurality opinion).

[7] *See e.g.*, *Arizona v. Inter Tribal Council of Arizona*, 133 S. Ct. 2247 (2013) (National Voter Registration Act preempts state statute requiring prospective voters to present evidence of citizenship); *Arizona v. United States*, 132 S. Ct. 2492 (2012) (Federal immigration law preempts multiple provisions of Arizona SB 1070); *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008) (Federal Aviation Administration Authorization Act preempts state requirements related to the transport of tobacco products); *Ahlborn*, 547 U.S. 268 (federal Medicaid law preempts state statute imposing liens on tort

In short, "the rule that there is an implied right of action to enjoin state or local regulation that is preempted by a federal statutory or constitutional provision—and that such an action falls within federal question jurisdiction—is well established." *Hart & Wechsler's The Federal Courts & The Federal System* 807 (Fallon et al. eds., 6th ed. 2009) (collecting cases).

This Court's decision in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), is consistent with this analysis. That decision makes clear that § 1983 does not provide a home for all preemption claims (but may be used only to vindicate federal "rights"), *see id.* at 107, but it nowhere suggests that preemption claims may not be directly asserted merely because § 1983 does not provide a vehicle to do so. That the Supremacy Clause itself "does not create rights *enforceable under § 1983*," *id.* (emphasis added), means only that certain

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settlement proceeds); *PhRMA*, 538 U.S. at 649-670 (plurality opinion) (Medicaid Act did not preempt state prescription-drug rebate law); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (Federal Cigarette Labeling and Advertising Act preempts state regulations on cigarette advertising); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) (federal Burma statute preempts state statute barring state procurement from companies that do business with Burma); *United States v. Locke*, 529 U.S. 89 (2000) (various federal statutes preempt state regulations concerning, *inter alia*, the design and operation of oil tankers); *Foster v. Love*, 522 U.S. 67 (1997) (federal election statute preempts Louisiana's "open primary" statute); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (Employee Retirement Income Security Act preempts portions of state benefits law); *see also* David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355, 365-400 (2004) (canvassing this Court's case law on preemption claims).

preemption claims may not be brought under § 1983, not that such claims may not be brought at all. Indeed, the dissent in *Golden State Transit*, which would have denied the award of money damages under § 1983, made that very point, explaining that denying relief under § 1983 "would not leave the company without a remedy" because "§ 1983 does not provide the exclusive relief that the federal courts have to offer," and that the plaintiffs could seek an injunction on preemption grounds. *Id.* at 119 (Kennedy, J., dissenting).[8]

While acknowledging that the federal courts have previously entertained direct actions to enforce the Constitution (including the Supremacy Clause), Petitioner, as well as some of its amici, has suggested that, where Congress has not provided a vehicle like

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[8] Section 1983 is not duplicative of the right of action for injunctive relief under the Supremacy Clause. By enacting § 1983, Congress expanded the kinds of state action that private litigants could challenge and the remedies they could seek beyond those available in suits directly under the Constitution. That § 1983 has been an important mechanism to secure constitutional rights by providing damages remedies against state and local officials does not mean that § 1983 is the only avenue through which unconstitutional state action can be challenged.

Likewise, an injunction enforcing the Supremacy Clause preserves the paramount place of federal law in our constitutional scheme without providing the full range of remedies, including damages, that might be available if Congress authorized a direct cause of action under a federal statute itself. For that reason, a direct cause of action under the Supremacy Clause does not "effect a complete end-run around this Court's implied right of action and 42 U.S.C. § 1983 jurisprudence." *Douglas v. Independent Living Center of S. Cal.*, 132 S. Ct. 1204, 1213 (2012) (Roberts, J., dissenting).

§ 1983 for such claims to be heard, the federal courts should entertain direct actions only when they are brought to prevent the threatened, imminent enforcement of an unconstitutional or preempted state law against the plaintiff. *See* Pet. Br. 40; National Governors Ass'n *et al.* Amicus Br. 25-27; Texas *et al.* Amicus Br. 14-15; U.S. Amicus Br. 18-21.[9] Those suggestions should be rejected for several reasons.

First, those arguments are inconsistent with this Court's uniform precedent. This Court has heard and sustained many direct equitable actions under the Constitution, including the Supremacy Clause, and also including preemption claims based on a federal spending statute, even when there was no evident enforcement action to which the federal claim might be raised as a defense. For example, in *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000), the challenged Massachusetts law barred government procurement of goods and services from companies doing business with Burma. *See id.* at 366-367. There was no "enforcement" action in which

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[9] The United States has taken the position elsewhere that the Supremacy Clause provides a direct cause of action that is not limited to asserting a defense to a state enforcement action. See, e.g., Compl., *United States v. Arizona*, 10-cv-01413 (D. Ariz. July 6, 2010) (filed by the United States as plaintiff challenging Arizona immigration law, seeking declaratory and injunctive relief and asserting "Violation of the Supremacy Clause" as its first cause of action) (*preliminary injunction aff'd in part and rev'd in part*, 132 S. Ct. 2492 (2012)); Compl., *United States v. Alabama*, 11-cv-02746 (N.D. Ala. Aug. 1, 2011) (similar, in challenge to Alabama law) (*preliminary injunction aff'd in part and rev'd in part*, 691 F.3d 1269 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 2022 (2013)).

the companies could raise preemption as a defense; the plaintiffs simply could no longer get government contracts. This Court held that the state law was preempted, necessarily presuming that there was a right of action under the Supremacy Clause that could be asserted directly and not merely in defense of an enforcement action. *Id.* at 367.

Similarly, in *Toll v. Moreno*, 458 U.S. 1 (1982), the Court considered a preemption challenge by a group of non-citizen Maryland residents to a University of Maryland policy that rendered the plaintiffs ineligible for in-state tuition rates based on their immigration classification. As in *Crosby*, the plaintiffs were not subject to an enforcement action, or a state regulation, forbidding them from certain primary conduct. Instead, they were simply denied an opportunity to apply for in-state tuition rates. The Court nonetheless reached the merits of the claim, and found that "insofar as it bars domiciled G-4 aliens (and their dependents) from acquiring in-state status, the University's policy violates the Supremacy Clause." *Id.* at 17. *See also Inter Tribal Council*, 133 S. Ct. 2247 (resolving National Voter Registration Act-based preemption claim that was raised affirmatively); *PhRMA*, 538 U.S. at 649-670 (plurality opinion); *id.* at 684 (O'Connor, J., concurring in part and dissenting in part) (seven Justices resolving Medicaid-based preemption claim that was raised affirmatively); *supra* pp. 11-12 (noting other examples of direct constitutional claims being entertained where they could not have been raised as defenses to enforcement actions).

Second, a rule barring many affirmative preemption claims, while allowing claims based on a

violation of constitutional *rights* to go forward in federal court under § 1983, would be extraordinarily inefficient and would undermine the effective vindication of federal law. Litigants frequently pursue both preemption theories and other constitutional claims. Cases before this Court teem with examples: businesses commonly pursue both preemption claims and claims under the Commerce, Contracts, or Due Process Clauses; immigrants pursue both preemption claims and claims under the Equal Protection Clause and First Amendment; racial minorities pursue both statutory claims and claims under the Fourteenth and Fifteenth Amendments. Very often, courts turn to the preemption claim first in order to avoid reaching difficult constitutional questions. *See, e.g.*, *Crosby*, 530 U.S. 363 (holding state procurement statute preempted by federal Burma statute, and thereby avoiding dormant Foreign Commerce Clause claim); *Toll*, 458 U.S. at 9-10 (holding Maryland policy preempted, and thereby avoiding Due Process and Equal Protection claims); *Hines*, 312 U.S. 52 (holding Pennsylvania registration law for non-citizens preempted by federal legislation enacted while the case was before the Supreme Court, and thus avoiding Equal Protection claim).

If litigants could not pursue both preemption claims (directly) and other constitutional claims (under § 1983) in a single action for equitable relief, then, in cases where a state forum was available for their preemption claims, they would be forced either to divide their federal claims between federal and state courts (which could well be barred by rules against splitting causes of action) or to forgo the federal forum for their § 1983 claims (which would be

contrary to the strong congressional policy in favor of affording a federal forum for such claims). *See, e.g.*, *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496 (1982). The far more efficient and sensible rule, as well as the one more consistent with this Court's decisions, is to allow equitable claims based on all provisions of the Constitution, including the Supremacy Clause, to be entertained in affirmative litigation through an action directly under the Constitution.

The rule proposed by Petitioner and its amici would have even more damaging results where there is no state forum for litigants' preemption claims. Many Supremacy Clause claims cannot be raised defensively at all, because there is no enforcement action in which they can be raised. In such circumstances, unless a state has decided to provide an alternative forum, an affirmative direct action under the Constitution is the only way in which the supremacy of federal law could be established. *See* David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355, 406 (2004) (discussing such claims). And, even when a litigant might be able to assert his Supremacy Clause claim in state court, his ability to establish the supremacy of federal law should not be dependent on the venues that state law happens to make available.

The history of the civil rights movement in this country well illustrates the need to enforce federal rights in the federal courts, without reliance on legislative grace or the vagaries of state law. Had § 1983 never been enacted, it could hardly be the case that state laws providing for segregated schools, white primaries, and restrictions on immigrants could have gone unchallenged. Plaintiffs could

challenge, and did challenge, such unconstitutional state laws directly under the Constitution, including the Supremacy Clause. And nothing in the Supremacy Clause suggests that it may not also be used directly to challenge state laws because they conflict with a federal law, and not (or not just) the federal Constitution. The Supremacy Clause itself provides that both the Constitution "*and* the Laws of the United States which shall be made in Pursuance thereof shall be the supreme Law of the Land." U.S. Const. art. VI (emphasis added).

Finally, nothing in the Supremacy Clause or this Court's precedent indicates that statutes enacted pursuant to Congress's Spending Clause power should be treated any differently than statutes enacted pursuant to other sources of congressional power, *i.e.*, that direct causes of action may not be brought to vindicate the federal structural interest in the supremacy of Spending Clause statutes. Indeed, numerous Spending Clause statutes—including Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and the Individuals with Disabilities Education Act—are critical in preventing discrimination and protecting civil liberties, and many others—such as Medicaid and the Supplemental Nutrition Assistance Program (previously called the Food Stamp Program)—provide a critical safety net on which low-income individuals and persons with disabilities rely for survival.

II. PRECLUDING DIRECT RIGHTS OF ACTION UNDER THE SUPREMACY CLAUSE WILL HAVE BROAD AND HARMFUL CONSEQUENCES FOR MAINTAINING THE SUPREMACY OF FEDERAL LAW.

An action under the Supremacy Clause provides an important—and sometimes the only—avenue to vindicate the supremacy of federal law. Barring a right of action under the Supremacy Clause could effectively foreclose this critical avenue for persons, especially racial and ethnic minorities, immigrants, persons with disabilities, and low-income individuals, who depend on federal law and who would otherwise be subject to invalid state and local laws.

A. Racial and Ethnic Minorities, Immigrants, Persons With Disabilities, And Low-Income Individuals Continue To Depend On Direct Actions Under The Supremacy Clause To Challenge Invalid State And Local Laws.

Racial and ethnic minorities, immigrants, persons with disabilities, and low-income individuals continue to rely directly on the Supremacy Clause to challenge invalid state and local laws in many important areas, including immigration, fair housing, public assistance, and health care. Many of those cases have involved legislation enacted under Congress's Spending Clause power, and the courts have routinely adjudicated and sometimes invalidated state laws that conflicted with the federal legislation.

For example, plaintiffs in recent years have used the Supremacy Clause to challenge the increasing number of state laws that seek to restrict immigrants' rights, including immigrants' employment opportunities. In *Chamber of Commerce v. Edmondson*, 594 F.3d 742 (10th Cir. 2010), plaintiffs claimed that provisions of the Oklahoma Taxpayer and Citizen Protection Act of 2007, which created new employee verification rules and imposed sanctions on employers that allegedly hire undocumented immigrants, conflicted with federal immigration law, which sets forth a comprehensive scheme prohibiting the employment of such individuals. The Tenth Circuit, which upheld in part a preliminary injunction against enforcement of the state law, explained that a "party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action." *Id.* at 756 n.13 (internal quotation marks omitted); *see also Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (adjudicating preemption challenge to Arizona law providing for the revocation or suspension of licenses in certain circumstances when state employers knowingly hire undocumented immigrants, but finding no preemption).

Numerous other courts similarly have addressed preemption challenges, under the Supremacy Clause, to state and local laws that affect immigrants' access to housing or otherwise target immigrant communities. *See, e.g., Valle del Sol Inc. v. Whiting*, 732 F.3d 1006 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1876 (Apr. 21, 2014) (sustaining pastor's preemption and due process challenges to state statute criminalizing provision of assistance to

unauthorized immigrants); *Lozano v. City of Hazleton*, 724 F.3d 297, 313 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1491 (Mar. 3, 2014) (finding preemption of municipal housing and employment regulations relating to immigrants); *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524 (5th Cir. 2013) (en banc), *cert. denied*, 134 S. Ct. 1491 (Mar. 3, 2014) (finding municipal housing regulations relating to immigrants preempted); *United States v. South Carolina*, 720 F.3d 518, 524-26 (4th Cir. 2013) (addressing separate preemption challenges to South Carolina immigration laws by United States and private parties, finding private plaintiffs had implied private right of action, and upholding preliminary injunction); *Ga. Latino Alliance for Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1261-1262 (11th Cir. 2012) (finding implied private right of action to challenge Georgia's Illegal Immigration and Enforcement Act of 2011 under Supremacy Clause and upholding preliminary injunction in part); *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997) (finding preempted most provisions of a state law that, *inter alia*, restricted immigrants' access to health care, social services, and education).

Low-income individuals have likewise invoked the Supremacy Clause to ensure compliance with federal housing laws. In *Kemp v. Chicago Housing Authority*, No. 10-cv-3347, 2010 WL 2927417 (N.D. Ill. July 21, 2010), a single mother of two argued that municipal rules unlawfully allowed the Chicago Housing Authority to terminate her public housing assistance in circumstances other than those specified and limited by the United States Housing Act of 1937. Kemp sought to enjoin the local law as

preempted under the Supremacy Clause. Although the court ultimately did not grant relief because of the Anti-Injunction Act, it concluded that the Supremacy Clause "create[s] rights enforceable in equity proceedings in federal court," and that it could therefore exercise jurisdiction over Kemp's preemption claim. *Id.* at *3 (internal quotation marks omitted).

Persons receiving public assistance have also invoked the Supremacy Clause to challenge state laws that terminate medical or other benefits in contravention of federal law. For example, in *Comacho v. Tex. Workforce Comm'n*, 408 F.3d 229 (5th Cir. 2005), the court invalidated under the Supremacy Clause state regulations that expanded the circumstances, beyond those allowed by federal law, under which Medicaid benefits could be cut off for low-income adults receiving assistance under the federal Temporary Assistance to Needy Families program.

And, in *Lankford v. Sherman*, 451 F.3d 496 (8th Cir. 2006), the Eighth Circuit relied directly on the Supremacy Clause to preliminarily enjoin a Missouri regulation that limited Medicaid coverage of durable medical equipment, such as wheelchair batteries, catheters, and suction pumps for respiration, to certain populations, making most Medicaid recipients with disabilities in Missouri ineligible to receive such items even if medically necessary. *Id.* at 511. The court found that the regulation conflicted with Medicaid's requirements and goals, including its goals with respect to community access for persons with disabilities, and therefore was likely preempted under the Supremacy

Clause. *Id.* at 513 (holding that plaintiffs had "established a likelihood of success on the merits of their preemption claim" for obtaining a preliminary injunction).

Direct actions under the Supremacy Clause, therefore, remain critically important to racial and ethnic minorities, immigrants, persons with disabilities, and low-income persons in our society who rely on them for vindication of federal law. The availability of that direct action ensures that state and local governments cannot undermine federal law by enacting statutes and regulations that deviate from federal requirements but would, absent a Supremacy Clause action, be effectively insulated from judicial review.

B. Precluding Rights Of Action Under The Supremacy Clause Would Undermine Important Federal Interests.

Precluding a right of action under the Supremacy Clause would leave important rights and interests effectively unprotected. Not only would the rights of individual litigants seeking to invalidate unconstitutional state laws be harmed, but important federal supremacy interests could go unprotected as well.

First, precluding rights of action under the Supremacy Clause would leave few, if any, effective remedies to force state compliance with many federal laws that are intended to benefit racial and ethnic minorities, immigrants, persons with disabilities, and low-income persons in our society. In the context of laws enacted under Congress's Spending Clause

power, the termination of federal funding may sometimes be theoretically available to remedy the State's failure to comply with its obligations under the Medicaid Act or other Spending Clause laws, *see PhRMA*, 538 U.S. at 675 (Scalia, J., concurring in the judgment), but that remedy is so rare and drastic as to be effectively unavailable as a meaningful enforcement tool. As commentators have explained, both political considerations and procedural hurdles make withdrawal of federal funding an illusory remedy. *See, e.g.*, Bradford C. Mank, *Suing Under § 1983: The Future After* Gonzaga University *v.* Doe, 39 Hous. L. Rev. 1417, 1431-1432 (2003) ("[A]s a practical matter, federal agencies rarely invoke the draconian remedy of terminating funding to a state found to have violated the [federal] conditions because there are often lengthy procedural hurdles that allow a state to challenge any proposed termination of funding, and members of Congress from that state will usually oppose termination of funding."); Jane Perkins, *Medicaid: Past Successes and Future Challenges*, 12 Health Matrix 7, 32 (2002) ("[T]he Medicaid Act provides for the Federal Medicaid oversight agency to withdraw federal funding if a State is not complying with the approved State Medicaid plan; however, this is a harsh remedy that has rarely, if ever, been followed through to its conclusion."); Lisa E. Key, *Private Enforcement of Federal Funding Conditions Under § 1983: The Supreme Court's Failure to Adhere to the Doctrine of Separation of Powers*, 29 U.C. Davis L. Rev. 283, 292-93 (1996) ("[O]ften the agency's only enforcement mechanism is a cutoff of federal funds for the program[,] [which] is rarely, if ever, invoked.").

Moreover, termination of federal funding would, in many circumstances, be counterproductive and contrary to Congress's intent that the funding program be implemented to provide a wide benefit. Indeed, persons who receive crucial benefits and services from federal programs usually do not want federal funding to be terminated. Terminating federal funding would not protect the interests of those injured by the State's noncompliance with federal law; rather, it would harm the very people Congress intended to benefit. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 704-705 (1979) (explaining that "termination of federal financial support for institutions engaged in discriminatory practices is severe" and "may not provide an appropriate means of accomplishing" the purposes of the statute); *see also* Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 Mich. L. Rev. 1201, 1227-1228 (1999) ("[T]he sanction of withdrawing federal funds from noncomplying state or local officials is usually too drastic for the federal government to use with any frequency: withdrawal of funds will injure the very clients that the federal government wishes to serve.").

The more effective way to vindicate the objectives of federal law is to allow private parties to continue to play an important role in enforcing the supremacy of federal statutes. As the United States previously argued, "those programs in which the drastic measure of withholding all or a major portion of federal funding is the only available remedy would be generally less effective than a system that also permits awards of injunctive relief in private actions in appropriate circumstances." *See* U.S. Cert. Amicus

Br., *Douglas v. Independent Living Ctr. of S. Cal.*, No. 09-958, at 19. In such circumstances, an injunction would force a State to comply with the federal provision at issue without harming the intended beneficiaries of the federal pro-gram.

Nor would it be appropriate to force individuals who depend on federal law to rely exclusively on the federal government to bring affirmative litigation to enforce compliance with the Supremacy Clause. Private rights of action are necessary because the government lacks the resources to police preemption disputes between States and private parties. *See* Sloss, *supra*, at 404. Private rights of action "increase the social resources devoted to law enforcement, thus complementing government enforcement efforts." Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 Va. L. Rev. 93, 108 (2005); *see also Ahlborn*, 547 U.S. at 291.

The recent cases challenging state and local immigration laws illustrate the importance of private rights of action. A wave of state and local immigration legislation began in 2006 and continued through approximately 2011. Private plaintiffs—individual immigrants, community organizations, and businesses—began challenging the laws immediately on preemption and other grounds. *See, e.g.*, *Lozano* (case initiated in 2006); *Whiting* (case initiated in 2007). The federal government largely agreed with the private plaintiffs' claims that the laws were preempted, and generally filed appellate amicus briefs (and a merits amicus brief in the Supreme Court) in support of the cases that reached

those levels. *See, e.g.*, U.S. Cert. Amicus Br., *Villas at Parkside Partners* (5th Cir. No. 10-10751); U.S. Amicus Br., *Whiting* (No. 09-115). But the United States did not begin filing challenges on its own behalf until 2010, and then only against a minority of the preempted laws, and only in instances where private plaintiffs had already filed suit.[10] Absent a right of action under the Supremacy Clause, there could well have been no meaningful remedy at all to invalidate many state and local laws that the courts found to be unconstitutional.

A private right of action under the Supremacy Clause serves other important values as well. The Supremacy Clause supports the structural guarantee of federalism—namely, that federal law will remain paramount. And that interest can only be effectively vindicated by ensuring that preempted state laws are invalidated—a goal that, for the reasons described above, can best be achieved through a private right of action.[11] In addition, by allowing robust enforcement

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[10] The United States filed actions challenging state laws enacted in Arizona, South Carolina, Utah, and Alabama. Unlike private plaintiffs, the United States did not directly challenge any local immigration laws, state laws in Georgia and Indiana, or Arizona's immigrant employment law.

[11] For example, preemption claims in immigration and other areas of law have been critical to preserving the federal government's paramount role in foreign policy. *See, e.g.*, *Hines*, 312 U.S. at 63 ("Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."); *id.* at 66-67; *see also Toll*, 458 U.S. 1, 10-13 (1982).

for preemption claims, a private right of action fosters uniformity and predictability in the application of both federal and state law. In order to realize the Constitution's fundamental promise that federal law will remain paramount over invalid state and local laws, it is essential for this Court to continue—as it has done for nearly two hundred years—to allow litigants to bring preemption challenges directly under the Supremacy Clause.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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